BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WYNONA L. ROTH-MARTINEZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 268,912
THE BOEING COMPANY	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY	)	
STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Claimant appealed the August 21, 2002 Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on February 11, 2003. Gary M. Peterson of Topeka, Kansas, was appointed Board Member Pro Tem to participate in this appeal.[1]

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for claimant. Eric K. Kuhn of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant contends that she injured her knees while working for respondent during the period from December 2, 1999, through December 14, 2001, when she was laid off. The parties stipulated that claimant sustained a six percent whole body functional

[1] On March 31, 2003, Mr. Peterson retired from the Board leaving a vacancy which was filled for purposes of this claim by his appointment as Board Member Pro Tem.

impairment due to her bilateral knee injuries. And in the August 21, 2002 Award, Judge Clark determined that claimant was only entitled to permanent partial general disability benefits based upon that functional impairment rating.

Claimant contends Judge Clark erred. Claimant argues that she is entitled to receive benefits for a 66 percent work disability (a permanent partial general disability greater than the functional impairment rating) based upon a 32 percent task loss and a 100 percent wage loss. In assessing task loss, claimant argues that the task loss opinion from Dr. Pedro A. Murati should be used as it is the only opinion that considers the effect of claimant's pain.

Conversely, respondent and its insurance carrier argue that claimant is not entitled to a work disability as she did not have any permanent work restrictions when she was laid off and, in addition, was performing her pre-injury job duties without any accommodation. Respondent and its insurance carrier cite the *Watkins*[2] decision as precedent.

The only issue before the Board on this appeal is the nature and extent of claimant's injuries and disability.

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. Claimant began working for respondent in early 1988. On December 2, 1999, claimant injured her left knee at work while carrying boxes of parts up and down stairs. Following a trial of conservative treatment, in May 2000 claimant underwent left knee surgery in which the surgeon performed a partial medial meniscectomy. After recuperating from surgery, claimant returned to work for respondent.

2. In late July or early August 2000, claimant began experiencing symptoms in her right knee. Again, following conservative treatment, in April 2001 claimant underwent right knee surgery in which the surgeon performed a plica resection, a partial medial meniscectomy and a chondroplasty. Claimant later returned to work for respondent and worked until December 14, 2001, when she was laid off. At that time, the work restrictions that claimant's knee surgeon, Dr. Kenneth A. Jansson, had placed upon her following the last surgery had expired.

[2] *Watkins v. Food Barn Stores, Inc.*, 23 Kan. App. 2d 837, 936 P.2d 294 (1997).

3. Claimant worked for respondent as a material processor/route driver. Claimant would obtain and deliver parts by scooter to coworkers. The work that claimant was performing at the time of the December 1999 accident required her to carry parts up and down stairs, but the storekeeper job that she was doing at the time of her December 2001 layoff was easier. The storekeeper job that claimant began working in April 2001, shortly before her right knee surgery, entailed receiving and stocking parts and inputting computer data as well as picking parts and delivering them to the shop. Moreover, that storekeeper job did not require claimant to carry parts up and down stairs.

4. According to claimant's last supervisor, Kevin M. Felts, when claimant returned to work for respondent in May 2001 following her right knee surgery she was able to perform the storekeeper job without any special accommodations. From the time that claimant came under Mr. Felts' supervision in April 2001 until her layoff in December 2001, claimant's job duties did not change. And because the shop where claimant worked after April 2001 did not have any stairs (unlike claimant's previous shop), the temporary work restriction against using stairs that claimant was given following the right knee surgery did not prevent her from performing her regular job duties.

5. The parties stipulated that claimant sustained personal injury by accident arising out of and in the course of employment with respondent from December 2, 1999, through December 14, 2001.[3] The parties also stipulated that claimant sustained a six percent whole body functional impairment as a result of the bilateral knee injuries.

6. When claimant testified at the April 2002 regular hearing, she was continuing to experience pain and swelling in both knees and popping in her right knee. According to claimant, the bilateral knee injuries have affected her standing, walking, sitting and sleeping.

7. At the time of the regular hearing, claimant remained unemployed although she was looking for sedentary work such as data entry, clerical, and receptionist-type jobs. At the regular hearing claimant introduced an exhibit that itemized approximately 120 contacts with potential employers that claimant had made between December

[3] Although the parties stipulated to this period of accident, an appropriate accident date may have been the last day that claimant worked in the job that required her to carry parts up and down stairs, which was one of the principal activities that caused claimant's injuries. See *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999), which holds that the appropriate accident date for a repetitive trauma injury is the last date before a worker is transferred to a substantially different job that does not entail the injurious activity that caused the injury.

18, 2001, and April 3, 2002. Claimant also testified that she had made several more contacts that were not listed on the exhibit.

8. At claimant's attorney's request, vocational consultant James T. Molski interviewed claimant and compiled a list of the work tasks that claimant performed in the 15-year period before developing her knee injuries. According to Mr. Molski, absent claimant returning to work for respondent, claimant has the ability to earn eight to nine dollars per hour. Mr. Molski testified, in part:

> Q. (Mr. Seiwert) Okay. And is there a difference on what she [claimant] would be able to earn depending on which doctor's restrictions you would use?
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> A. (Mr. Molski) Probably from not a perspective of just a general labor market, but absent continuing to work with the previous employer [respondent], that she would not be able to earn the same type of wages in the general economy. She did have some training in clerical and office work and actually worked at Boeing as a clerk initially. I felt she could probably earn 8 to $9 an hour utilizing those skills.[4]

9. Again, at claimant's attorney's request, Dr. Pedro A. Murati examined claimant in September 2001 for purposes of this claim. The doctor determined claimant had sustained a 12 percent whole body functional impairment due to her bilateral knee injuries. Moreover, the doctor recommended that claimant observe the following work restrictions and limitations:

> No squatting, crawling or kneeling, or lifting, carrying, pushing, pulling, greater than 35 pounds, rarely do stairs and ladders. Occasional walk -- standing and walking, and lifting up to 35 pounds, frequently 20 pounds. Use of good body mechanics at all times, no lift below knuckle height.[5]

Dr. Murati reviewed the list of former work tasks prepared by Mr. Molski. The doctor determined that claimant could no longer perform 32 percent of those work tasks due to her bilateral knee injuries.

10. At the Judge's request, in February 2002 Dr. C. Reiff Brown examined claimant and reviewed her pertinent medical records. The doctor concluded that claimant had

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[4] Molski Depo. at 7-8.

[5] Murati Depo. at 8.

sustained bilateral posterior tears of the medial meniscus as a result of her work activities that required her to frequently "carry parts up and down stairs, continually be on her feet, [and] frequently squat, carry and walk."[6] Moreover, the doctor determined that claimant should observe permanent work restrictions as a result of her bilateral knee injuries. The doctor testified, in part:

> I felt that she [claimant] had the necessity to avoid certain work activities and among those I suggested that she avoid stairs on a frequent basis, squatting on a frequent basis, and avoid altogether working in a squat position.[7]

But in applying those work restrictions to Mr. Molski's list of former work tasks, the doctor concluded that claimant was able to perform all of the tasks. The doctor acknowledged, however, that performing certain activities such as prolonged walking or standing would increase claimant's knee pain although those activities might not advance her injury or make her prone to additional injury.

11. Although it may be true that respondent was not required to make any special accommodations for claimant when it returned her to work in May 2001 following her right knee surgery, the particular storekeeper position that claimant worked allowed her to self-limit her work activities. According to her supervisor, claimant worked with a young, healthy coworker with eye problems who would perform the more strenuous work in exchange for claimant performing the computer work. Furthermore, the storekeeper job accommodated the temporary work restriction from Dr. Jansson prohibiting claimant from using stairs as all of claimant's work was performed on one floor.

12. The Board is not persuaded by Dr. Brown's opinion that claimant has not sustained any task loss. The doctor does not explain the seemingly inconsistent opinions that claimant injured her knees at work from frequently carrying parts up and down stairs, constantly being on her feet and frequently squatting and that she should be restricted from frequently being on stairs, frequently squatting and working in a squat position but, on the other hand, that she is not restricted from performing any of the tasks that caused her injuries. Likewise, the Board is not persuaded that Dr. Murati's work restrictions and task loss opinions are entirely accurate. Accordingly, the Board averages the zero percent task loss opinion provided by Dr. Brown with the 32 percent task loss opinion provided by Dr. Murati and finds that claimant has

[6] Brown Depo., Ex. 1 at 1.

[7] Brown Depo. at 5.

lost the ability to perform 16 percent of the work tasks that she performed in the 15-year period before developing her bilateral knee injuries.

CONCLUSIONS OF LAW

The Award should be modified to increase claimant's permanent partial general disability to 58 percent.

When an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[8] and *Copeland*.[9] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas

[8] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[9] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[10]

And the Kansas Court of Appeals in *Watson*[11] recently held that the absence of a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that in such circumstances the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the worker's ability to earn wages.

Nonetheless, the Judge determined claimant's permanent partial general disability should be limited to her functional impairment rating as claimant returned to work for respondent following her knee surgeries without special accommodations. Claimant contends the Judge misinterpreted the law. The Board agrees.

In January 1998, the Kansas Court of Appeals decided *Gadberry*.[12] In that decision, the Court of Appeals held that a worker who returned to work at her pre-injury wage but who was terminated within a few weeks in a layoff was not precluded from receiving a work disability. Moreover, the Court of Appeals noted that there was no evidence that the employer was accommodating the worker with a light-duty job.[13] The Court stated, in part:

> Gadberry's return to work at the same wage that she had been receiving prior to her [January 21, 1994] injury does not preclude a finding of wage loss since she was given notice of her termination just a few weeks later, and the termination was based on an economic layoff. Pursuant to *Lee*, Gadberry became eligible for compensation on a work disability upon her termination, one component of which is wage loss.[14]

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[10] *Id.* at 320.

[11] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[12] *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 975 P.2d 807 (1998).

[13] *Id.* at 804.

[14] *Id.* at 805.

In addressing whether the principles in *Foulk* should preclude claimant from receiving a work disability, the Court stated:

> Gadberry would have continued to work at Polk if she had not been terminated. The record reflects that Gadberry applied for retirement benefits subsequent to her termination because she needed health insurance. Even after she had applied for retirement benefits, Gadberry sought employment with numerous employers within the community. Gadberry did not refuse employment; it was never offered to her.[15]

Consequently, in *Gadberry* the Court of Appeals held that the worker was entitled to receive a work disability after she was terminated in an economic layoff despite returning to her regular work without accommodations.

In January 2003, the Kansas Court of Appeals in *Cavender*[16] held that a worker who had obtained other employment following a work injury was entitled to receive work disability benefits after resigning her employment for reasons unrelated to the injury. The Court reasoned that the proper test to apply in these situations is whether the worker has made a good faith effort to find appropriate employment. The Court wrote, in part:

> K.S.A. 44-510e(a) allows work disability in excess of functional impairment only if the claimant is making less than 90% of his or her preinjury gross weekly wage. If this percentage is met, K.S.A. 44-510e(a) provides the equation for computing work disability[.]
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> . . . .
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> The cases interpreting K.S.A. 44-510e have added the requirement that an employee must set forth a good faith effort to secure appropriate employment before work disability will be awarded.
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> The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis. . . .[17]
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> . . . .

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[15] *Id.* at 806.

[16] *Cavender v. PIP Printing, Inc.*, 31 Kan. App. 2d 127, 61 P.3d 101 (2003).

[17] *Id.* at 129-130 (citations omitted).

> The purpose of the good faith test, at its very core, is to prevent employees from taking advantage of the workers compensation system. In situations where post-injury workers leave future employment, the good faith test is extended to determine whether leaving was reasonable. Clearly, in the cases cited by PIP [the employer], leaving employment was reasonable when the employment became outside physical restrictions or the changed circumstances justified a refusal of accommodated employment. However, the reasonableness of leaving employment is not limited to a decision based on work restrictions or injuries.
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> The present case is closest in nature, while still not on point, to those cases where an injured employee is terminated due to economic downturn and layoffs and the employee is found to still be entitled to work disability. **Those cases present a situation where termination or leaving employment is unrelated to the workers compensation injury or restrictions.** . . .[18]

And the Kansas Court of Appeals has consistently held that factors other than a worker's injury and permanent medical restrictions may be considered in determining whether a worker has made a good faith effort to find employment.[19]

Respondent and its insurance carrier argue, in effect, that the Board should stray from the plain language of K.S.A. 44-510e in assessing claimant's permanent partial general disability. The Board disagrees.

> The fundamental rule of statutory construction is that the intent of the legislature governs. When the language used is plain, unambiguous, and appropriate to an obvious purpose, the court should follow the intent as expressed by the words used. When construing a statute, a court should give words in common usage their natural and ordinary meaning.[20]
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> Although appellate courts will not speculate as to the legislative intent of a plain and unambiguous statute, where the construction of a statute on its face is uncertain, the court may examine the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished, and the effect the statute may have under various suggested interpretations.[21]

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[18] *Id.* at 132 (citation omitted) (emphasis added).

[19] See *Ford v. Landoll Corp.*, 28 Kan. App. 2d 1, 11 P.3d 59, *rev. denied* 269 Kan. 932 (2000).

[20] *Hedrick v. U.S.D. No. 259*, 23 Kan. App. 2d 783, 785, 935 P.2d 1083 (1997) (citations omitted).

[21] *Estate of Soupene v. Lignitz*, 265 Kan. 217, 220, 960 P.2d 205 (1998) (citations omitted).

In concluding that claimant should be limited to a permanent partial general disability based upon her functional impairment rating, the Judge cited the *Watkins*[22] decision. In *Watkins*, the injured worker was denied a work disability after being terminated due to the company's closure. But the Kansas Court of Appeals has held that *Watkins* does not apply to the present definition of work disability. In *Watkins*, the Court of Appeals interpreted K.S.A. 1992 Supp. 44-510e, which defined permanent partial general disability as follows:

> the extent, expressed as a percentage, **to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced,** taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.[23]

In direct contrast to the former definition of work disability that measured a worker's ability to earn a comparable wage and measured the worker's ability to perform work in the open labor market, the present work disability formula is measured by actual wage loss and actual loss of former work tasks. In short, under the present formula for work disability the worker's ability to perform the job that the worker was doing at the time of the accident is not determinative of whether an injured worker is entitled to receive a work disability.

Unlike the formula for work disability that controlled the *Watkins* decision, the present work disability formula measures the loss of work tasks from jobs other than the job that the worker was performing at the time of the accident, as long as those other jobs were performed within 15 years of the accident. Moreover, unlike K.S.A. 1992 Supp. 44-510e, the present work disability formula only measures the theoretical loss of ability to earn wages (as required by *Copeland*) when a worker has failed to make a good faith effort to look for appropriate employment.

In *Gadberry*, the Kansas Court of Appeals noted the important distinctions in defining permanent partial general disability under the former and present versions of K.S.A. 44-510e. The Court wrote, in part:

> To arrive at a fair and accurate assessment of the effect of work-related injuries, the Kansas Legislature has, throughout the life of the Workers

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[22] *Watkins*, 23 Kan. App. 2d at 837.

[23] *Id.* at 838 (emphasis added).

> Compensation Act, considered several compensatory theories. This court reviewed the legislative evolution of the work disability concept in *Lee v. Boeing Co*. Although various formulas have been adopted in an effort to ascertain a fair measurement of a worker's disability, prior to 1993, the formulas were primarily based on the concept of compensation for the loss of *abilities* – the ability to earn wages and/or the ability to perform work. For various reasons, measuring disability compensation by the loss of abilities resulted in concerns about increased litigation and higher insurance premiums. Therefore, in 1993, the Kansas Legislature introduced a new factor into the equation – actual wage loss. The new two-part test for finding and measuring work disability includes both a measurement of the loss of ability to *perform work tasks* and *actual loss of wages* resulting from the worker's disability. . . .[24]

In the same decision, the *Gadberry* Court noted that the present permanent partial general disability formula in K.S.A. 44-510e provided "an objective determination of wage loss – the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker was earning after the injury" and that the statute did not set forth any exceptions to that mathematical calculation.

Moreover, in *Helmstetter*,[25] the Kansas Court of Appeals specifically held that *Watkins* was not applicable to the present definition of work disability. The Court of Appeals stated:

> Further, *Watkins* involved a different definition of work disability. The former version of K.S.A. 44-510e involved an ability test both as to jobs and wages, and *Watkins* is premised on that ability test.[26]

The Board is also aware of the *Newman*[27] decision in which the Kansas Court of Appeals applied *Watkins* to an accident under the present work disability formula. *Newman*, which in July 2002 was ordered published, does not address the significant changes in defining permanent partial general disability in the former and present versions of K.S.A. 44-510e. Moreover, *Newman* neither acknowledged that the Kansas legislature had changed the definition of work disability nor that *Helmstetter* had held that *Watkins* does not apply to the present definition of work disability. Accordingly, the *Newman* decision does not address the issue before the Board in this claim.

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[24] *Gadberry*, 25 Kan. App. 2d at 802-803 (citation omitted).

[25] *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 281, 28 P.3d 398 (2001).

[26] *Id.* at 281.

[27] *Newman v. Kansas Enterprises*, 42 P.3d 752 (Table), Kan. App. 2002, March 15, 2002.

Finally, the Kansas Court of Appeals in a decision issued May 16, 2003, held in *Sharp*[28] that *Watkins* does not apply to the present permanent partial general disability formula. And on July 9, 2003, the Kansas Supreme Court entered an order to publish the *Sharp* decision.

According to the above appellate court decisions that are applicable to this claim, the relevant issue is not whether a worker returned to work without accommodations but whether the worker has made a good faith effort to find and retain appropriate employment. If the worker has made a good faith effort to find and retain employment, then the actual difference in the worker's pre- and post-injury earnings should be used in determining work disability. If the worker has not made a good faith effort to find work, then a post-injury wage should be imputed based upon the worker's post-injury ability to earn. Consequently, not all workers who are earning less than 90 percent of their pre-injury wage are entitled to receive a work disability award.

In the claim now before us, due to a poor economy claimant is no longer working for respondent. Moreover, claimant is now competing for jobs in the labor market saddled with bilateral knee injuries and permanent work restrictions. Also, as determined above, claimant has lost the ability to perform 16 percent of her former work tasks, which also adversely affects her ability to find appropriate work and limits her labor market.

The Board finds that respondent, perhaps unintentionally, did accommodate claimant's bilateral knee injuries. The greater weight of the evidence indicates that the storekeeper job that claimant was working after the right knee surgery allowed her to avoid climbing stairs and, with the help of her coworker, allowed her to avoid the more strenuous requirements of her job. In effect, the storekeeper job that claimant was working at the time of her layoff was ideal for claimant as she was able to perform that job without significantly aggravating her knees.

Because claimant has established a good faith effort to find appropriate employment since being laid off, her actual wage loss should be used for the permanent partial general disability formula. Consequently, claimant has a 100 percent wage loss and a 16 percent task loss, which creates a 58 percent work disability.

As provided by the Workers Compensation Act, the parties may request to review and modify this award upon claimant obtaining employment or upon any other appropriate basis.

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[28] *Sharp v. Custom Campers, Inc.*, ___ Kan. App. 2d ___, 74 P.3d 42 (2003).

AWARD

WHEREFORE, the Board modifies the August 21, 2002 Award and increases claimant's permanent partial general disability to 58 percent.

Wynona L. Roth-Martinez is granted compensation from The Boeing Company and its insurance carrier for a December 14, 2001 accident and resulting disability. Based upon an average weekly wage of $1,285.66, Ms. Roth-Martinez is entitled to receive 2.86 weeks of temporary total disability benefits at $417 per week, or $1,192.62, plus 236.95 weeks of permanent partial general disability benefits at $417 per week, or $98,807.38, for a 58 percent permanent partial general disability and a total award not to exceed $100,000.

As of September 5, 2003, Ms. Roth-Martinez is entitled to receive 2.86 weeks of temporary total disability compensation at $417 per week in the sum of $1,192.62, plus 87.14 weeks of permanent partial general disability compensation at $417 per week in the sum of $36,337.38, for a total due and owing of $37,530, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $62,470 shall be paid at $417 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of September 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director